

W. FLETCHER, Circuit Judge, dissenting:

Melody Swenson claims that the United States Postal Service violated Title VII by failing to respond appropriately to her complaint of sexual harassment by a co-worker. After a three-day hearing, an Administrative Law Judge of the Equal Employment Opportunity Commission found that the Postal Service had, indeed, violated Title VII. After a five-day trial, a federal jury found the same thing. The majority disagrees with the jury and sets aside its verdict. I dissent.

The Supreme Court has recently reminded us of the applicable standard when a losing party moves to set aside a jury verdict:

[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.” Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.

*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 150-151 (2000) (citations omitted). The Court rebuked the Fifth Circuit for failing to apply that standard:

In holding that the record contained insufficient evidence to sustain the jury’s verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. [T]he court disregarded critical evidence favorable to petitioner

[and] failed to draw all reasonable inferences in favor of petitioner. . . . In concluding that the [employer's evidence] so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.

*Id.* at 152.

The majority wilfully flouts *Reeves*. It claims that it states the facts “consistent with the jury’s verdict.” Majority at 2. But its statement of the facts would be “consistent with the jury’s verdict” only if the Postal Service had won the verdict. The majority draws reasonable inferences in favor of the Postal Service. It makes credibility determinations in favor of the Postal Service. It weighs the evidence and draws conclusions in favor of the Postal Service. But the Postal Service did not win a verdict. Melody Swenson did. The majority is therefore required to draw inferences, make credibility determinations, weigh evidence and draw conclusions in *her* favor.

The majority and I do not disagree over the fine points of Rule 50. Nor do we disagree over one or two small pieces of evidence. Rather, the majority simply chooses to believe the Postal Service’s story of what happened, even though the jury chose not to believe it. In the materials that follow, I tell the story as Swenson is entitled to have it told, and as *Reeves* requires that it be told.

## I. Sexual Harassment of Swenson

Melody Swenson has been deaf from birth. She can read lips and can speak in verbal English, but she communicates most comfortably in American Sign Language (“ASL”), which has a somewhat different vocabulary and syntax from English. She reads and writes English with great difficulty.

Swenson began working at the Postal Service in 1977 at the age of 18, as a janitor cleaning toilets. One year later, she had successfully obtained a promotion to a job as a clerk, sorting and casing mail. At the time of the events described in this appeal, Swenson was in her early thirties. Nothing in the record indicates that she ever complained about her working environment during the sixteen years between her hiring and the events giving rise to this suit.

Philip Feiner was one of Swenson’s co-workers. Feiner had worked at the Postal Service for about 20 years at the time of the events at issue. His first wife, a Korean whom he met while he was in the military, was deaf. Because she and her children knew Korean sign language rather than American sign language, Feiner enrolled in a basic ASL class along with them upon their arrival in the United States. Feiner aspired to be an actor and described himself as a man of “very

formal manners.” At the time of the events in this case, he was unmarried.

When Swenson began working at the San Francisco Processing Center in August 1993, Feiner’s interest in her initially appeared benign. He inquired about her children and her marriage, and asked Swenson to teach him some ASL. Within a month, however, his attention became unwelcome. Swenson testified that by September, Feiner told her that he dreamed of her. He said, “I like you because you are beautiful—you have a beautiful body, and you’re sexy.” Somewhat confused, Swenson responded by saying “thank you” and leaving. On another occasion, Feiner clarified his meaning by making an hourglass motion with his hands as he mouthed the word “sexy.” Later, Feiner asked her how to sign the word “sex,” and when Swenson, embarrassed, showed him, he laughed and walked away, repeating it.

On one occasion, Swenson testified that she observed Feiner and one of her supervisors pointing at her and speaking. When she asked Feiner what they had been saying, he told her that he had been talking to the supervisor “because you’re so beautiful, and you have a beautiful sexy body, and I was watching your ass moving.” Shocked, Swenson excused herself and went back to work. What Feiner characterized to the jury as “gallant” behavior was not limited to crude and unsettling comments. Swenson testified that on at least one occasion, Feiner said,

98-16799d.wpd

“I want to kiss you and go to a private room.” She refused and told Feiner that she was married.

Swenson testified that she could not easily avoid Feiner because her job required her to pass through his work space, and that she never went near his space for any other reason. Feiner’s job, however, allowed him to visit her, and he often did. Swenson testified at trial that Feiner could also watch her from his workplace, and did so every day. His constant attention bothered her and made her feel sufficiently uncomfortable that she complained to her co-workers about his conduct.

In December 1993, Feiner approached Swenson as she attempted to “clock in” to work. He asked if he could give her a Christmas gift. She told him, “No, you don’t have to,” and “I don’t want it.” Feiner responded, “Oh yes. I want to because I like to, and I want to give it to you.” Swenson left the area, but the next day, Feiner came to her work area and threw a package at her, which contained a pen. After this incident, Swenson caught Feiner watching her while the other employees were away, and when she did, he said to her, “You’re beautiful. You have a beautiful body. You have a sexy body, and you’re my favorite.” He told her that she was wearing “his favorite blouse,” and that it looked “really good” on her.

On January 24, 1994, Feiner approached Swenson without warning and said, "I remember three months ago about the kiss." He then said, "Wait, I'm not finished talking. Do you remember three months ago about the kiss? . . . I want to kiss you." He told her he wanted to kiss her because she was his "favorite." Swenson refused and protested again that she was married. Feiner said, "Well, come here," grabbed her hand, and, when she tried to pull back, maintained his grip. Only when Swenson screamed (using her voice) "Stop it!" did he retreat. She testified at trial that she was upset, shocked and scared, and that she felt like she was about to be raped when Feiner grabbed her hand. When her co-workers returned after their break, she related the story to a female co-worker named Li Lee, who wanted to tell their supervisor, Ruben Domingo, about the problem. Swenson, still frightened, agreed.

Li Lee testified that she immediately told Domingo that Feiner had hurt Swenson's hand in an attempt to grab and kiss it. Domingo testified that he told Feiner that day not to go near Swenson. Another supervisor, Barbara Faciane, testified that she repeated this instruction four days later, on January 28. Domingo told Feiner that what he had done "could be" sexual harassment. Swenson testified that Domingo "never" spoke to her "at any time" about her allegations of sexual harassment by Feiner.

Two days later, on January 26, Feiner approached Swenson despite the direction from Domingo not to do so. The circumstances were similar to those of Feiner's other unwanted advances: none of Swenson's co-workers were nearby, she was focused on her work, and Feiner interrupted her. Swenson testified that Feiner asked her why she had told everyone about the incident and said that it had embarrassed him. He said, "I'm sorry, I won't bother you again." She stated at trial that he finished by saying, "Please, I need you to be my friend. I need your friendship. Can we shake?" Swenson testified, "I felt at a loss, and felt like he was really harping on me." Swenson testified that she shook Feiner's hand to make him leave, and that he promised to leave her alone thereafter.

Feiner did not live up to his promise. Swenson testified that the very next day, "he said, 'Good morning, Hi. Hi.' really adamantly. And I felt really uncomfortable, and I said, 'I have to leave, I have to get out of here,' and I left." Later that day, on January 27, Swenson attended a safety meeting run by a supervisor named Randy Rollman. Because a sign language interpreter was present, Swenson was able to tell Rollman about the events of January 24. Swenson testified that Rollman was "shocked" and said that he would "make some plans."

According to Feiner, virtually none of Swenson's story is true. Feiner

admitted at trial that he had kissed Swenson's hand on several occasions, and that he had told her that he would "bet she looked lovely in a dress." But he denied making advances towards her, denied asking her to sign the word "sex," denied mentioning her "beautiful ass," and denied calling her "sexy." According to Feiner, Swenson said she would be happy to accept his Christmas gift.

Feiner's account of the grabbing incident on January 24 was that Swenson had called out to him and that she had said that she was happy to see him. He claimed that when he reached out his hand to shake hers, she put her gloved hand in his. Feiner testified that he took this opportunity to teach her "high class" manners: "I held her wrist very lightly and started tugging on the end of her glove, and I said, 'You shouldn't shake hands with somebody with a glove on.'" Feiner admitted that Swenson immediately reacted with horror. Feiner said that the next night another clerk alerted him to the fact that Swenson had been telling others of the incident, and that he then apologized to her. With some prompting, he also mentioned that he had been warned by Domingo to stay away from Swenson. He claimed that after the apology, he never attempted to speak a word to Swenson, and actively avoided crossing her path.

The jury clearly disbelieved Feiner, as it had every right to do. In the space of nine pages of transcript, Swenson's attorney repeatedly demonstrated Feiner's



lack of credibility. First, on cross-examination, the attorney asked Feiner if he “had taken about a year of sign language at a local high school.” Feiner replied that this was “not correct.” However, in his declaration supporting summary judgment, which was then read to the jury, Feiner had stated, “My children and I . . . attended some classes together in American Sign Language at a local high school for about a year.”

Second, Feiner testified that he generally refuses to shake hands with people wearing gloves until they take their gloves off. He stated that doing so was “not good manners.” He testified that when Swenson neglected to take her own glove off on January 24, he gave her the “benefit of the doubt” because he “started to believe that she had never been taught at home high class manners.” The attorney then asked Feiner pointedly whether he had also given Swenson the benefit of the doubt “because of her handicap.” He responded with a single word: “No.” But in a previous statement, which was then read to the jury, Feiner had said, “In this case because of her handicap I was giving her the benefit of the doubt and trying to teach her something at the same time.” And even though the jury had already heard testimony from Feiner’s supervisor that Feiner had admitted trying to kiss Swenson’s hand on January 24, Feiner denied ever admitting anything of the sort.

Third, in prior sworn testimony, Feiner had said that because he thought deaf

98-16799d.wpd

people felt insecure and isolated, he would say “Hello, how are you,” and “You look nice” to Swenson “every night when I saw her.” But once again, he changed his story at trial; when asked if he routinely greeted and complimented Swenson, he denied doing so. He claimed at trial that Swenson initiated nearly 90% of their conversations.

## II. Action by the Postal Service

The jury found that Philip Feiner sexually harassed Melody Swenson, and the majority appears to concede that its finding supported by the evidence. *Cf. Star v. West*, 237 F.3d 1036 (9th Cir. 2001). The ultimate legal question before us is not, however, whether there was sexual harassment. The question, rather, is whether the Postal Service acted appropriately once Swenson’s allegations of harassment were brought to its attention.

Negligence is the standard of care imposed by Title VII on employers in cases of allegations of co-worker sexual harassment. “An employer is negligent with respect to sexual harassment if it knew *or should have known* about the conduct and failed to stop it. Negligence sets a minimum standard for employer liability under Title VII[.]” *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759

(1998) (emphasis added). “When harassment by co-workers is at issue, the employer’s conduct is reviewed for negligence.” *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864, 875 (9th Cir. 2001). “[E]mployers are liable for failing to remedy or prevent a hostile work environment of which management-level employees knew, or *in the exercise of reasonable care should have known.*” *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991) (emphasis added) (internal citation omitted).

Under the negligence standard, an employer must take “prompt and appropriate remedial action.” *Intlekoffer v. Turnage*, 973 F.2d 773, 779 (9th Cir. 1992); *see also Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995) (“prompt, effective action”). The totality of an employer’s actions, including its investigation of the alleged harassment, must be “prompt and appropriate.” An employer may conduct an investigation and conclude, based on that investigation, that no sexual harassment occurred. But the investigation itself must have been “prompt and appropriate.”

The majority concludes that there was insufficient evidence to support the jury’s finding that the Postal Service failed to take “prompt and appropriate remedial action” after Swenson brought to its attention the allegations of Feiner’s sexual harassment. I strongly disagree. There was ample evidence to support a

conclusion that the Postal Service's investigation was negligently conducted, that the Postal Service "knew or should have known" of Feiner's harassment, and that the totality of the Postal Service's response to Swenson's allegations was not "prompt and appropriate remedial action."

#### A. Notice to the Postal Service

There were two different dates on which the jury was asked to find that the Postal Service was on notice of allegations of sexual harassment by Feiner. The first date was sometime in August or September 1993, shortly after Swenson began working near Feiner. Christopher Rom, a co-worker, testified that Swenson had complained to him of Feiner's behavior and had asked him to speak to Feiner. Rom had declined to speak to Feiner, but had spoken instead to their supervisor, Ruben Domingo. Rom testified as follows about that conversation:

Q: And do you remember what you said to Mr. Domingo?

A: I was thinking that he might not understand if she told him. So I offered to tell him that she didn't like Phil Feiner coming in and talking to her.

The second date was January 24, 1994, when (as recounted above) Li Lee spoke to Domingo about Feiner grabbing Swenson's hand and trying to kiss her.

The jury made a special finding that the Postal Service was on notice of the

98-16799d.wpd

alleged sexual harassment as of the second date, January 24, 1994. The majority does not dispute that there is sufficient evidence in the record to support this finding. The question, then, is whether the Postal Service took “prompt and appropriate remedial action” after it was put on notice on January 24, 1994.

#### B. Action by the Postal Service after January 24, 1994

After Li Lee told Swenson’s story to Ruben Domingo on January 24, Domingo spoke to Feiner but said nothing to Swenson. After Swenson spoke directly to Randy Rollman three days later, on January 27, Rollman said he would “make some plans.” Supervisor Barbara Faciane then convened a meeting the next day, on January 28. Without giving Swenson any warning, Domingo approached her and asked her to come with him. He took her to a room where three Postal Service supervisors were waiting.

At trial, Swenson described what happened:

I said, “What’s going on?” and we walked and he showed me in. And I was kind of shocked, you know, to see—Randy said, “Hi, come on,” and I said, “Where is the interpreter?” And I was very upset about that because I felt that . . . under the American Disability Act they’re supposed to get interpreters for those sorts of meetings. And he said, “We don’t have time to deal with an interpreter. Just write it down.” And one would talk, and the other would talk. And I wasn’t able to

talk to him, and Randy said, "Please write." He said, "What happened?" and I gestured and started to cry, "Please leave me alone. Tell Phil to leave me alone." And I was crying, and they tried to calm me down, and [I said,] "He's bothering me, leave me alone." And I was very nervous and I wrote, and then we went into a different door. And I noticed Li Lee was there and so I sat down with Li Lee and they closed the door. And that's when I wrote, and I would ask Li Lee to spell some of the words.

With Li Lee's help, Swenson prepared a signed and dated statement, written on eight Postal Service routing slips.

Because of Swenson's difficulty with standard English, her January 28 statement is ungrammatical and awkward and contains frequent misspellings. But the statement unambiguously recounts Feiner's behavior, as the following excerpts make clear:

I got a new bid on Aug 17 to South and North Main. Phil Feiner talk to me. He say Hi and my name is Phil and he lean sign lang and smile at me. . . . Last November he say "Melody, tell me how sign sex." I feeling very shock about it. I say, "What?" and he say, "Please give kiss me, please go private." . . . He say, "Melody, I'm very happy to see you." every day and "I always watch on you." and "You are beautiful." . . . Last Monday, he walk to see me then he say, "I remember that last three month ago." I say "What?" He say, "Wait I'm not finish", I say, "OK, what?" He say "Do you remember that about me kiss you?" . . . And he try grab my right hand very hard (looking like rape). My hand off to him and I say "Stop it" He say, Hey "don't do that." I look at him to face He very angry and mad. My hand very hurt. Then I have to tell Judy Chow and Lee and Chris about it. They are very surprise and shock. Please help me tell Mr Rubben Dimmgo. . . . He talk to Phil about it. Then last Wednesday Phil say, "Excuse me, . . . I'm sorry won't bother you no more." . . . Today, in the moring he still looking at me again . . . He say Hi and his hand wave. And still he walk and still looking at

me all the time.

Li Lee gave a written statement to Faciane at the January 28 meeting. Faciane did not interview or obtain statements from co-workers Christopher Rom and Judy Chow, even though they were both named in Swenson's written statement. (As will be seen in a moment, both Rom and Chow could have corroborated Swenson's story in important ways.) Rom eventually provided a written statement to Postal Service "management" about two months later. Chow was never interviewed by the Postal Service, and she never provided a written statement.

Also on January 28, immediately after the meeting at which Swenson and Lee gave their statements, Rollman moved Swenson to another work area. He did so without notice and against her wishes. She testified:

Q: And do you know why you were moved?

A: I don't know. I was surprised. I didn't know why they were moving me. . . . I was very surprised by that when I was moved.

\* \* \*

Q: Did you want to be moved?

A: No.

Q: Did any member of the management at the San Francisco Processing Center ask your opinion on whether or not you wanted to be moved?

A: No.

Q: Who told you that you were going to be moved?

A: Mr. Rollmann [sic]. He showed me. He took my hand, and he showed me. He said, "Down there," and that was without an interpreter or anything.

Barbara Faciane testified that the Postal Service had moved Swenson only after

getting her permission, but the jury had every right to believe Swenson's testimony and to disbelieve Faciane's testimony.

On February 3, the Postal Service provided a sign language interpreter to Swenson for an hour. The interpreter helped Swenson edit her January 28 written statement by fixing grammar, verb tense and spelling. (The statement is quoted above in its unedited form.) Swenson added only six lines to her January 28 statement on February 3, all of them concerning her fear that Feiner might have a gun. (There is no evidence that Feiner, in fact, had a gun, and no issue was made at trial of the possibility that he might have had one.) Except for addition of the six lines, the January 28 statement was substantively unchanged. Swenson was unable to complete the editing and supplementing process in the hour during which the interpreter was made available to her. Despite her inability to finish, the Postal Service did not make the interpreter available for a longer period.

On February 4, the day after she provided her edited statement, Swenson went on leave. On February 3 or 4, Rollman had arranged for a meeting to take place the following week, at which Swenson could meet personally with Feiner. However, because Swenson did not come to work after February 4, that meeting never took place.

No further investigative activity took place until early March. Then, after a

98-16799d.wpd



meeting of Swenson, her union representative, and the Postal Service's plant manager went badly, the Postal Service finally "opened up" an "official investigation." The supervisor who conducted this investigation, Charles Bonds, testified that the renewed activity began "because some meeting Jim [Larson, the plant manager,] had with Swenson didn't turn out too well . . . . Jim came to me right after that and asked me to open up an official investigation."

Swenson came back to work in April, after Bonds began his investigation. Before she returned to work, her union representative had requested that Feiner, rather than Swenson, be moved during the investigation. Swenson was the party complaining that she had been sexually harassed, but it was she who had been moved; Swenson had been moved, against her will, after giving a written statement backed up by her co-worker Li Lee; and it was now about two months later, the "official investigation" was just getting under way, and Swenson was still assigned to the new workplace. Bonds relayed the request to Larson. Bonds testified that Larson "dismissed [the request] offhand." Larson said that he "saw no need."

The majority states that "Swenson agreed to return to work if assigned to the location where Faciane had moved her on January 28, away from Feiner's work area." Majority at 5. The statement that Swenson agreed to come back to work "if assigned to the [new] location" implies that she wanted to come back to work at

that location. Indeed, the statement may be read to imply that she would come back to work *only if* she could work at the new location. The majority's statement is based on a very unlikely inference. Its only support is in the transcript of Bond's third interview with Swenson, which took place on April 4. Before the actual interview began, Bonds dictated the following:

Mr. Jansen [Swenson's attorney] requested that this interview be held today with the sole purpose of getting Melody back to work. There have been some discussions off the record as to how this was going to transpire, and the following is what has been agreed to. Melody will return to work at the PD and C, her regular tour . . . . While this matter is still under investigation, Melody will be reassigned to the 030 operation. This will enable management to make sure there is a separation of her and Mr. Feiner.

The background for Bonds' dictated statement is that Swenson, through her union representative, had just requested that Feiner's workplace be moved to allow her to return to work at her old location, and that Jim Larson, the plant manager, had dismissed that request "offhand." Bonds does not describe the off-the-record negotiations that led up to the agreement he recites. But the most likely inference is that, far from insisting that she return to the new work location, Swenson continued to want to have Feiner's location moved so that she could return to her old location. Only if the Postal Service continued to refuse to move Feiner would she have reluctantly agreed to return to work at the new location.

Swenson had stayed away from work since February 4 because, as she stated

at trial, she was “scared”:

Q: Why did you stay off of work?

A: Because I was scared. I was scared. I was very nervous and afraid, and I tried to go back one morning, and I couldn’t make it. I turned around, and I went back home. I was very scared, and I was shaking and I went back home.

After she returned to work, Swenson encountered Feiner on a number of occasions. She testified that on one of those occasions, Feiner “looked very mad. . . . He kind of gave me an angry facial expression and stared at me and gave me a dirty look, and I was taken aback by that. It made me very nervous and my heart started to pound.” On other occasions, “he would walk past me repeatedly or he would walk past where I was working[.]” She testified that she felt “just so scared, and I tried to avoid him[.] . . . But when I would see him, I would feel scared, and sometimes I’d go to the bathroom and sit just to be alone for a bit and calm down.”

Swenson had three interviews with Bond. She told him the same basic story of harassment she had already recounted in her January 28 statement, but with additional details. Along with recounting the details of the past harassment, Swenson told Bonds that Feiner was continuing to behave in ways that made her nervous and scared. Despite the obvious relevance of Feiner’s ongoing behavior to his investigation, Bonds never asked Feiner about it. Bonds testified at trial that he had asked Feiner, but Swenson’s counsel forced him to retract his testimony.

Bonds testified in the afternoon:

Q: . . . Ms. Swenson makes the following statement [in her interview with you], “And then he, you know, here comes Phil again standing there just staring at me, and it made me real nervous. And, you know, I just stayed home since then because I’m real scared of him just standing around just watching me all the time.”

Do you recall Ms. Swenson making that statement to you in the course of the investigative interview?

A: Yes.

Q: Did you speak with Mr. Feiner about that?

A: Yes, I did.

Q: And did you speak with Mr. Feiner about that in the course of your investigative interview with him?

A: I believe I did.

Bonds then was given the evening to re-read the transcript of his interview with

Feiner. He testified the next morning:

Q: Now, did you have an opportunity to review Mr. Feiner’s interview . . . ?

A: Yes, I did.

Q: And did you find anywhere in there where you asked Mr. Feiner about staring at Melody Swenson?

A: About staring at Melody Swenson?

Q: Yes.

A: I did not — I don’t recall seeing it in there.

During the course of his investigation, Bonds interviewed only two people, Swenson and Feiner. He never interviewed any of Swenson or Feiner’s co-workers to see if any corroborating evidence existed. He did not interview Li Lee, who had initially complained to Domingo on Swenson’s behalf and who had accompanied her to the January 28 meeting. He also did not interview Christopher

Rom. Rom testified that he provided a written statement “to management” (not “to Bonds”) in March, but Bonds never testified that he read this statement. Judy Chow was never interviewed by anyone, and was never asked to provide a written statement.

Indeed, Bonds did not even ask Swenson about the *existence* of possible additional witnesses. In evidence that was presented to the jury, the EEOC ALJ recounted that Bonds had testified that he had asked Swenson about possible additional witnesses, but that his testimony had turned out to be untrue:

Although Bonds testified [in the EEOC hearing] that he believed that he had asked Swenson about additional witnesses at one of the three investigations, I have reviewed all three transcripts and could find no indication that he had asked her.

After completing his official investigation in April or May, Bonds consulted again with Larson. Together, they concluded that there had been no harassment and terminated the investigation.

\* \* \*

Bonds repeatedly told the jury that he found no harassment because he had found no evidence corroborating Swenson’s story. He first testified that there was

“not just cause” to take action against Feiner “because there was no way for her to back up what [she] was saying.” He then testified that discipline of Feiner would not have been appropriate “because she didn’t—there was no one to back her up, okay, and then Feiner’s explanation.” Finally, he testified that he did not believe Swenson because “well, basically there was no backing up of her story.”

If Bonds had interviewed Lee, Rom, and Chow, he would have found the corroborating evidence he said he needed but did not have. All three co-workers had been listed by Swenson, by name, in the statement she had provided on January 28. The jury heard or read about the testimony of all three.

First, Li Lee told the jury that Feiner had only begun entering their work area after Swenson began working there. Lee testified that Swenson complained “quite a few times” to her of Feiner’s unwanted attention, and that she had spoken to supervisors on Swenson’s behalf.

Second, Christopher Rom told the jury that Swenson had complained to him of Feiner’s behavior well before January 24, and had asked him to speak to Feiner on her behalf. As indicated above, Rom testified that he told their supervisor, Ruben Domingo, about the problem with Feiner. Rom also testified that between August 1993 and January 1994, he and Swenson would take their breaks at odd hours in order to avoid Feiner.

Third, Judy Chow had testified at the EEOC hearing on Swenson's behalf.

The ALJ wrote (and the jury had before it) the following:

Coworker Judy Chow testified that Feiner would pursue Swenson and that it was clear from Swenson's body language that she did not want to talk to him. When approached by Feiner, Swenson would be restless, darting and would sometimes back up trying to get away. Chow also testified that Feiner had told her about two interludes with Korean women who did not speak English well. She testified that one of these women was a Postal employee whom Feiner said he convinced to leave her husband to live with him. Chow testified that it was her perception that Feiner had a pattern of victimizing women who did not communicate in English well. Chow testified that Swenson was in tears after the incident wherein Feiner grabbed her hand.

I found Chow to be a credible witness who testified in a very honest and straightforward manner.

Chow's testimony would have been particularly valuable to Bonds' investigation.

She testified before the EEOC that Feiner had a pattern of sexually harassing vulnerable women, and that Swenson was in tears after Feiner grabbed her hand and tried to kiss her. This was precisely the sort of corroborating evidence that Bonds said he needed. Chow's testimony makes clear that her evidence was there for the asking. The problem for the Postal Service (and for the majority) is that Bonds did not ask.

Neither Lee, Rom, nor Chow directly observed the alleged harassment by Feiner. According to Swenson's own testimony, they could not have, for Feiner's pattern of behavior was to approach her while she was alone. This is, of course,

the most common behavior pattern of harassers. Lee, Rom, and Chow would have corroborated Swenson's story in a number of important respects; indeed, they would have provided just the sort of corroborative evidence that is commonly available in sexual harassment cases. Bonds gave no reason at trial why he did not interview these co-workers, and the Postal Service suggests no reason in its arguments to us.

If the jury could have found that a non-negligent investigation by Bonds would have discovered this evidence corroborating Swenson's story, the jury verdict in her favor is clearly sustainable. The majority is aware of this critical point, but chooses not to address it head-on. Instead, it merely states:

[Bonds] investigated the grabbing incident and [Swenson's] other complaints by interviewing or obtaining written statements from her co-workers and supervisors. He also reviewed all transcripts and documents associated with the case.

Majority at 4. The majority thus suggests, without stating it explicitly, that Bonds had evidence from all relevant witnesses, including Lee, Rom, and Chow.

There are only three pieces of testimony in the record from which the majority could conceivably infer that Bonds conducted an investigation that included interviews with or statements by Lee, Rom, and Chow. Because the majority does not quote or refer to this testimony, I quote it here. The testimony



makes clear that the majority's inference is unlikely.

The first testimony is by Bonds. But the testimony makes clear that he interviewed only Swenson and Feiner:

Q: And did you interview anybody?

A: Yes.

Q: Please describe.

A: Well, my interview with Mrs. Swenson is one. Mr. Feiner is two.

In his forty pages of testimony, Bonds refers repeatedly to these two interviews. He nowhere mentions interviews with anyone else or written statements by anyone else. The majority states that Bonds "obtained a written statement from Christopher Rom." Majority at 11. But Bonds never testified that he obtained or even read such a statement, and Rom never testified that he gave a statement to Bonds.

The second testimony is by Randy Rollman concerning the January 28 meeting organized by Barbara Faciane. (This was the meeting at which Swenson cried and wrote her unedited statement on postal routing slips.) Rollman testified:

Q: What, if anything, did you [Rollman] do in connection with the investigation?

A: The following evening [January 28] . . . we asked all the individuals to come up one at a time where they sat down, and we interviewed them.

Q: Who do you recall having asked to come upstairs?

A: Aside from Melody [Swenson] and Phil Feiner, Ruben Domingo, who was Melody's immediate supervisor at the time, and Li Lee was one of Melody's coworkers.

Bonds was not at that meeting. Indeed, he did not open up his official investigation

until over a month later.

The third testimony is by Bonds:

Q: What was the reason no disciplinary action was taken against Mr. Feiner, if you know?

. . .

A. Mr. Larson called me into his office and asked me if I had read transcripts and *any other documents* that may have been associated with the case. And I told him that I had, and he wanted to know whether or not if I had found any sexual harassment. I said, “Well, I didn’t,” and he said, “I didn’t either.”

(Emphasis added.) The majority appears to infer that Bonds’ general reference to “any other documents” indicates that he read written statements prepared by Swenson’s co-workers during the course of his investigation. It is very unlikely that this phrase refers to such statements.

As an initial matter, if Bonds had read statements by Lee, Rom, and Chow, he almost certainly would have mentioned them. In his forty pages of testimony, Bonds nowhere mentions a statement by any of them. Further, and more important, if Bonds had read such statements, he would have been unable to say truthfully that he knew of no evidence corroborating Swenson’s story. There is some evidence that Bonds was a less-than-forthcoming witness (see his retractions, recounted above); but the majority does not suggest that Bonds testified untruthfully. (If the majority were to conclude that Bonds lied on the stand about

the lack of corroborating evidence, this would, of course, create a different but equally severe problem for the Postal Service.) Finally, and perhaps most tellingly, Chow never prepared a written statement. There is thus no document containing her testimony that Bonds could have read.

In a further attempt to defend Bonds' investigation, the majority infers that the jury did not believe Rom's testimony at trial. Rom had testified before the EEOC that he had spoken to Domingo on Swenson's behalf in August or September of 1993. Based on that testimony (which was not presented to the jury), the ALJ found that the Postal Service had been put on notice of possible sexual harassment at that time. As discussed above, the jury found that Rom had not put the Postal Service on notice; rather, according to the jury, the Postal Service was put on notice only when Li Lee spoke to Domingo on January 24, 1994. The majority concludes from this that "[t]he jury plainly did not accord Rom the same credence as did the administrative law judge." Majority at 20 n.17.

The majority's inference is very unlikely. A much more likely inference is that the jury believed Rom, but concluded that his statement to Domingo simply did not provide notice of sexual harassment. The jury did not know what Rom said in the EEOC hearing, and therefore could neither believe nor disbelieve that testimony. The only testimony before the jury was, as indicated above, that Rom

had told Domingo that Swenson “didn’t like Phil Feiner coming in and talking to her.” The jury reasonably concluded that this statement did not put the Postal Service on notice of sexual harassment. Indeed, given the nature of the statement, the jury could hardly have concluded otherwise.

\* \* \*

Swenson filed a formal complaint with the EEOC on June 1, 1994. An ALJ conducted three days of hearings in May 1995. The ALJ heard testimony from Feiner and Swenson, as well as from Lee, Rom, and Chow, the co-workers whom Bonds had failed to interview. The ALJ concluded that the testimony supported Swenson’s view of the facts, and the ALJ’s written findings were placed in evidence before the jury. The ALJ concluded not only that Feiner had harassed Swenson, but that the Postal Service’s investigation had been inadequate. The Postal Service rejected the EEOC’s findings two months later.

Feiner was never transferred, even temporarily, from his work place in the Postal Service. No entry was ever made in his employment file. The most significant actions taken against him were the discussion in which Domingo told Feiner that grabbing and kissing Swenson’s hand “could be” sexual harassment,

and the instructions from Domingo and Faciane that Feiner should stay away from Swenson (which Feiner disobeyed). Ruben Domingo conceded somewhat reluctantly at trial that his “discussion” with Feiner was not discipline. Charles Bonds also testified that he told Swenson that there had been “no discipline” of Feiner.

Randy Rollman testified that after the Postal Service’s rejection of the EEOC findings, Swenson lodged further complaints that Feiner continued to act in ways that made her uncomfortable. Rollman told her, “It’s going to happen on occasion. There’s nothing we can do.” Melody Swenson finally quit her job on June 16, 1995. She turned her back on eighteen years of employment with the Postal Service because, as she testified, she felt that its supervisors were not protecting her and that they did not care about her or her concerns.

### III. Review of the jury verdict

The question before the jury was whether the totality of the response by the Postal Service to Swenson’s allegations of sexual harassment was “prompt and appropriate remedial action.” *Intlekoffer*, 973 F.2d at 779. The totality of the response includes, but is not limited to, the investigation conducted by the Postal

Service. In its verdict, the jury concluded that the Postal Service was on notice of Swenson's allegations on January 24, 1994, when Li Lee told Ruben Domingo about Feiner's harassment. The jury further concluded that the Postal Service's response after that date was not "prompt and appropriate."

The question before us in reviewing that verdict is not whether we would have reached that verdict if we had been jurors. Rather, it is whether there is sufficient evidence in the record from which the jury could reasonably have reached its verdict. In deciding that question, we must conclude that the jury resolved all credibility disputes and weighed all the evidence in favor of Swenson, and we must draw all reasonable inferences from the evidence in favor of Swenson. *Reeves*, 530 U.S. at 151-52. Under that standard, the jury's verdict is clearly sustainable.

Based on the evidence presented to it, the jury could reasonably have concluded the following: The Postal Service was put on notice of allegations of sexual harassment of Melody Swenson by Philip Feiner on January 24, 1994. Four days later, it convened a meeting at which Feiner and Swenson were asked to give statements. At that meeting, Swenson was not provided an interpreter. She was confused by the jumble of talk and began to cry. She prepared a written statement, as best she could, with the help of her co-worker Li Lee. In her statement, she

named three co-workers who could corroborate her story—Li Lee, Judy Chow and Christopher Rom. Li Lee also gave a corroborating written statement at that meeting.

Immediately after the meeting on January 28, Swenson was moved to a new work location. She was given no advance notice of, or explanation for, the move. She did not give permission to be moved, and did not want to be moved. On February 3, Swenson tried, with the help of a sign language interpreter, to edit and supplement her January 28 statement, but her efforts were cut short because the Postal Service only made the interpreter available for an hour. Swenson went on leave on February 4 and did not return to work until April because of her continuing fear of Feiner. Her union representative asked that Feiner's work location be moved so that Swenson could return to her original work location when she came back to work, but the Postal Service refused. Jim Larson, the plant manager dismissed the request "offhand."

An official investigation was conducted by Charles Bonds, a Postal Service management employee. Bonds interviewed Swenson and Feiner. He did not ask Swenson in his interviews with her if there were co-workers who could corroborate her story. (He initially testified before the EEOC ALJ that he had done so, but that was not true.) He also did not ask Swenson if Feiner was still behaving

in ways that made her nervous and afraid. (He initially testified before the jury that he had done so, but that also was not true.) Based on his interviews with Swenson and Feiner, Bonds concluded that Feiner had not sexually harassed Swenson. Bonds' stated reason for his conclusion was the lack of corroborating evidence turned up in his investigation.

Bonds neither interviewed nor read written statements of the three co-workers—Li Lee, Christopher Rom, and Judy Chow—whom Swenson had listed in her written statement prepared and presented to the Postal Service on January 28. Lee, Rom, and Chow testified before the jury, and their testimony provided precisely the sort of corroborating evidence that Bonds said he needed but had not found. Bonds could easily have interviewed or read statements of Lee, Rom, and Chow, but he negligently failed to do so.

If Bonds had conducted a competent investigation, he would have uncovered evidence that would have led him to conclude that Feiner sexually harassed Swenson. If he had so concluded, the Postal Service would then have been in a position to take appropriate remedial action. For example, such action might have included moving Feiner's workplace rather than Swenson's when Swenson and Lee gave their statements to Barbara Faciane on January 28; it might have included moving Feiner's workplace to allow Swenson to return to her original workplace



when she came back to work in April; and it might have included some sort of formal discipline of Feiner. But because of Bonds' negligent investigation, no appropriate remedial action at all was taken.

Based on the foregoing, it is obvious that there was sufficient evidence from which the jury could reasonably have concluded that the totality of the Postal Service's response not "prompt and appropriate remedial action."

#### IV. Conclusion

The majority in this case has taken the law into its own hands. Based on its own evaluation of the evidence, it reverses a jury verdict in favor of Melody Swenson. It reweighs the credibility of witnesses, it discounts evidence favorable to Swenson, and it draws inferences favorable to the Postal Service. This would be appropriate if the Postal Service had won the jury verdict, but it did not.

Swenson won the jury verdict. She is entitled to have *her* witnesses believed, to have *her* evidence fully credited, and to have to inferences drawn in *her* favor. This has been the law since time immemorial. It is enshrined in Rule 50, and the Supreme Court underlined it a year ago in *Reeves*. In reversing the jury verdict, the majority has "disregarded critical evidence favorable to" Swenson, has

“failed to draw all reasonable inferences in favor” of Swenson, and has  
“impermissibly substituted its judgment concerning the weight of the evidence for  
the jury’s.” *Reeves*, 530 U.S. at 152. I dissent.